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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-799

JEANNE KELLOG SCHWARTZ,
Petitioner,

v.

GEORGE M. SCHWARTZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. ____

JEANNE KELLOG SCHWARTZ,
Petitioner,

v.

GEORGE M. SCHWARTZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF THE STATE OF MARYLAND

Your Petitioner, Jeanne Kellog Schwartz, prays that a Writ of Certiorari issue to review the decision of the Maryland Court of Special Appeals affirming a finding of the Circuit Court for Montgomery County, Maryland. That court held that a decree of Custody from the Eleventh Circuit Court of Florida for Dade County upholding the Respondent's petition

for custody of the minor child of the parties was entitled to full faith and credit in the Maryland courts despite its reversal of the Maryland court's prior custody decree of one month standing awarding custody to the Petitioner.

OPINION BELOW

The opinion of the Maryland Court of Special Appeals is reported in 26 Maryland Appeals 427, 338 A.2d 336 (1975) and is appended as Appendix A herein. The decision of the Maryland Court of Appeals denying the Petition for Writ of Certiorari is appended as Appendix B herein.

JURISDICTIONAL STATEMENT

Jurisdiction in this matter is based upon 28 U.S.C. 1257 (3), in that it involves an interpretation by the Court of Special Appeals of Maryland of the application of Article IV, Section One of the Constitution of the United States.

QUESTIONS PRESENTED

1. In the absence of any allegation of changed circumstances, is the State of Florida entitled, thirty-three days after a valid Maryland custody decree has been entered, to change the Maryland custody award without violating the Full Faith and Credit Clause of the United States Constitution?

2. Is the State of Maryland obligated by the Full Faith and Credit Clause to recognize a Florida decree which directly conflicts with a prior Maryland custody decree in the absence of any allegation of changed circumstances and in view of the

failure of the Florida court to give full faith and credit to the prior valid Maryland custody decree?

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section One of the Constitution of the United States:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATEMENT OF THE CASE

The parties hereto were married in Florida on June 15, 1956 and were subsequently divorced there on November 30, 1964. However, the parties continued to live together and their minor child was born on February 17, 1966. In March, 1971, the Petitioner returned to her parents' home in Bethesda. Thereafter, beginning on June 16, 1971, extensive litigation concerning custody of the child was begun in the Circuit Court for Montgomery County, Maryland, in which both parties appeared, both through counsel, and personally. Eventually, on May 15, 1973, the Respondent was awarded pendente lite custody of the child and subsequently took the child to his home in Dade County, Florida. A hearing on the permanent custody in the Montgomery County Circuit Court was scheduled for July 26, 1973, and the Respondent had indicated that he would be present, together with the child. However, on July 23, 1973, he filed for custody himself in the Eleventh Judicial Circuit for Dade County, Florida, and in

fact did not appear at the Maryland hearing on July 26. Further, he attempted to dismiss his counsel and attack the jurisdiction of the Maryland court by filing at the time of the Maryland hearing a Motion to Dismiss, but did not appear personally. His motions were denied and the Petitioner was awarded pendente lite custody, which was subsequently changed to final custody on August 30, 1973, by Judge H. Ralph Miller.

Subsequently, the Petitioner went to Florida where she filed a Writ of Habeas Corpus on September 21, 1973, and the hearing on this petition was consolidated with the hearing of the Respondent for custody. Both were heard on September 28, 1973. A final judgment awarding custody to the Respondent was entered on October 2, 1973. No mention was made of the Maryland custody decree of August 30, 1973, and consequently no consideration was given to the issue of full faith and credit in the Florida court, although it was raised by Florida counsel for the Petitioner. Eventually the Petitioner regained physical custody of her minor child and returned with the child to her parents' home in Bethesda, Maryland. On August 22, 1974, the Respondent filed a Petition for Writ of Habeas Corpus in the Montgomery County Circuit Court. Subsequently, a hearing was held before Judge Miller on October 31, 1974. On November 1, 1974, Judge Miller affirmed the Writ of Habeas Corpus on the grounds that the Florida court had concurrent jurisdiction in the matter, and their decree being later in time, was entitled to full faith and credit. Later, a stay of execution was granted by Judge Miller pending the posting of bond by the Petitioner while appellate proceedings were conducted in the Maryland courts. However, the Respondent took the child from her school in Bethesda, Maryland, on December 16, 1974 and

returned to his home in Florida. At this time the Respondent has taken the child out of the country, and both his whereabouts and those of the minor child are unknown.

The Petitioner wishes to note that Maryland has, subsequent to these proceedings, adopted the Uniform Child Custody Jurisdiction Act as Chapter 265 of the Laws of Maryland 1975, and codified as Article 16, Sections 184 through 207 of the Annotated Code of Maryland, 1957 Edition, 1973 Replacement Volume, 1975 Supplement. Florida has not adopted this Act.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The Petitioner believes that this Petition presents squarely to the Court an issue that has been specifically reserved by the Court since 1962 in the decision of *Ford v. Ford*, 371 U.S. 187, 9 L.Ed.2d 240, 83 S.Ct. 273. That issue is whether or not a child custody decree of a rendering state must be given full faith and credit pursuant to Article IV, Section One of the Constitution of the United States in the forum state, in the absence of changed circumstances affecting the welfare of the minor child and which changes a prior valid decree of the forum state.

It is most unfortunate that the Maryland Court of Special Appeals never reached this question, grounding its opinion on the finding that the Florida court had concurrent jurisdiction with the Maryland court, and therefore its decree of custody was valid, even though it failed to recognize the prior Maryland decree. Because it was valid, the court held, it was

therefore entitled to full faith and credit and the issue of whether or not the Florida court was constitutionally required to give some recognition to the Maryland decree was simply never reached.

The Petitioner believes that the question of jurisdiction need not be reached. She believes that the court has three options open in resolving this question. Under the first option, this Court could rule that child custody decrees of the rendering state are always entitled to full faith and credit, whether or not there has been any change in circumstances which would justify the forum state in refusing to recognize the judgment of the rendering state as binding. This view has apparently been rejected by this Court, as will be discussed in detail. The second option would be to hold that child custody decrees need never be given constitutional recognition, regardless of any change in circumstances. This view has also apparently been rejected. The third option, and the question presented squarely here, is the middle ground between these two positions: whether or not changed circumstances should be the determining factor in extending Constitutional recognition to a child custody decree from another state. Under any of the three theories considered, the question of jurisdiction in the Florida courts is moot, and were it not for the fact that the Maryland Court of Special Appeals decided the case on that issue it would not even be discussed here. Quite frankly, Petitioner concedes that this is primarily a factual issue which this Honorable Court is not likely to consider, regardless of the merits of any argument presented. She urges that the ever-increasing number of contested child custody cases which involve interstate and indeed multi-state jurisdictional conflicts makes this an opportune time for the Court to specifically decide the point reserved in *Ford v.*

Ford, supra. The Petitioner recognizes that this Court has apparently reserved this question consistently, by denying certiorari in other cases raising these issues, such as *Berlin v. Berlin*, 21 N.Y.2d 371, 288 N.Y.S.2d 44, 235 N.E.2d 109 (1967), Remitted & Amended 21 N.Y.2d 970, 237 N.E.2d 358 (1968), cert. den. 393 U.S. 480, 21 L.Ed.2d 111, 89 S.Ct. 118 (1968).

Petitioner urges that the time has come for the court to decide this question even if the decision is adverse to her. Until this issue is decided this Court will continue to be inundated with appeals raising variations on the full faith and credit theme because of ever-increasing numbers of divorce and custody proceedings in the United States. Petitioner believes that the issue raised here is of such constitutional significance as to justify consideration by this Court.

POINT I

THIS HONORABLE COURT HAS SPECIFICALLY RESERVED JUDGMENT ON THE ISSUE OF WHETHER OR NOT A FINAL DECREE AWARDING CHILD CUSTODY FROM THE RENDERING STATE MUST BE GRANTED FULL FAITH AND CREDIT IN THE FORUM STATE IN THE ABSENCE OF AN ALLEGATION OR SHOWING OF CHANGED CIRCUMSTANCES AFFECTING THE WELFARE OF THE CHILD INVOLVED.

This issue was last discussed by this Court in *Ford v. Ford, supra.* In that opinion this Court specifically reserved a finding on this issue, citing in footnote 3, its earlier decision

to the same effect in *Kovacs v. Brewer*, 356 U.S. 604, 2 L.Ed.2d 1008, 78 S.Ct. 963 (1958):

> "that the state of the forum has at least as much leeway to disregard the judgment, to qualify it or to depart from it, as does the state from which it is rendered."

It seems clear that if there has been a change of circumstances, the forum state may indeed refuse to give constitutional recognition to the custody decree of the rendering state. In footnote 2 the Court states:

> "We have held that a court in one state can so modify a decree made in another state. *New York ex rel Halvey v. Halvey*, 330 U.S. 610, 91 L.Ed. 1133, 67 S.Ct. 903 (1947)"

It is important to stress that under the facts of this petition there could not have been any allegation of change of circumstances, nor was there ever any indication that this allegation was made or considered by the Florida court when it reversed the Maryland custody decree. The reason is quite simple: the Maryland decree was dated August 30, 1973, and the Florida hearing was held September 28, 1973, during which time the Respondent had continuous custody of the minor child in Florida, despite the Maryland decree.

In his dissent in *Kovacs v. Brewer, supra* (at 356 U.S. 612, 613), Justice Frankfurter argued that no child custody decree should ever be automatically extended full faith and credit. However, the Petitioner believes that this position has been rejected in *Kovacs v. Brewer, supra, New York ex rel Halvey v. Halvey, supra, Ford v. Ford, supra* and *May v. Anderson*, 354 U.S. 528, 97 L.Ed. 1121, 73 S.Ct. 40 (1953), and this petition therefore is based upon the assumption that the Court has decided custody decrees are entitled to full faith and credit in the absence of changed circumstances.

The best discussion of this issue that the Petitioner has found since *Ford v. Ford, supra*, is contained in *Kennedy v. Carmen*, 471 S.W.2d 275 (1971) where the Court of Appeals for Kansas City, Missouri cites many authorities, including Restatement of the Law, Conflict of Laws, Second, Chapter 3, Section 79, Comment C, pages 238-239 (1971) as follows:

> "Full faith and credit does not require that a custody decree be awarded greater effect in a sister state than it enjoys in the state of rendition. If the decree remains subject to modification because of changed conditions in the state of rendition, as will almost invariably be the case, the decree will similarly be modifiable in sister states. *New York ex rel Halvey v. Halvey*, 330 U.S. 610 (67 S.Ct. 903, 91 L.Ed. 1133) (1947). For this reason, custody decrees do not enjoy the same extra-territorial effect as do unmodifiable judgments. At the least, the courts of the sister state determine whether the custody provisions of the decree stand in need of modification because of changed conditions."
>
> "The welfare of the child is always the overriding consideration. *For this reason, probably the majority of courts have not felt themselves bound by full faith and credit, even in the absence of changed conditions,* to enforce without question the provisions of the custody decree rendered in another state. As a matter of policy, such decrees will frequently not be reexamined when a parent who is dissatisfied with the first award brings the child into the state of the

> forum for the sole purpose of obtaining a redetermination of the custody issue. In other situations, courts have advanced little hesitation in reexamining the decree and in rendering a new one of their own when this was believed necessary for the best interest of the child." (Emphasis supplied).

The Missouri court goes on th quote from Clarke: Divorce, Alimony and Custody, page 324:

> "Fortunately, perhaps, in view of *May v. Anderson*, the full faith and credit clause is of relatively slight importance in custody cases."

The Petitioner believes this to be an overly sweeping assessment of that case, which appears to be grounded on the issue of personal jurisdiction.

Indeed, in *Hawkins v. Hawkins*, 264 Or. 221, 504 P.2d 709 (Oregon 1972) in discussing *May v. Anderson, supra*, the Court stated (at Page 715 of 504 P.2d):

> "Much of the confusion on this subject would appear to be attributable to the fact that because of the welfare of the child subject to an order or decree of custody is the paramount consideration. An order or decree awarding custody of the child is not a 'final' judgment, but is always subject to modification by the court. This being true, it now appears that in so far as full faith and credit is concerned (as opposed to jurisdiction) recent decisions by the Supreme Court of the United States makes it clear that an order or decree by the court of one state awarding custody of the child is no more binding upon the courts of other states than it is upon the court which originally issued such an order or decree. If this is

> correct, and if the original order or decree of custody is subject to change in that court upon showing of a subsequent change of circumstances it would follow that the courts of other states are not required to give binding effect to the original order or decree but may also modify or change it upon showing of the same fact that would permit its modification or change by the court of its original entry."

Petitioner does not believe that any voluminous discussion of state authorities serves any useful purpose except to point out that this interpretation of this Court's holdings appears to be consistent. See, for instance, *Kennedy v. Carmen*, 471 S.W.2d 275, Missouri (1971), *Spencer v. Durham*, 283 No.Car. 671, 198 S.E.2d 537, North Carolina (1973), 24 AmJur.2d, Divorce and Separation, Section 1000.

It is interesting to note that the Florida courts apparently are adopting the changed circumstance rule in such cases as *Powell v. Powell*, 242 So.2d 138 (1971) where the Court ruled that there could not have been any appreciable change in circumstances pertaining to the welfare of the child, since the Florida custody petition was filed only four days after a Louisiana custody judgment had been entered. If this is a correct ruling of the Florida law, then the Florida courts would appear to be somewhat inconsistent in applying the law, since the two decrees in this petition were only thirty-three days apart.

The Petitioner would like to again emphasize the importance of resolving this issue, and to cite the problem raised in *Kennedy v. Carmen, supra*, in which that court noted that in *Stout v. Pate*, 209 Ga. 786, 75 S.E.2d 748, cert.

den. 347 U.S. 968, 98 L.Ed.2d 1109, 74 S.Ct. 774 (1954) and *Pate v. Stout*, 120 Cal. App.2d 699, 261 P.2d 788 (1954) cert. den. 347 U.S. 968, 98 L.Ed.2d 1110, 74 S.Ct. 776 (1954):

> "Georgia and California handed down inconsistent decrees within months; each case having been litigated on the merits, each one having been apprised of the contrary decision of the other. Nevertheless, the Supreme Court denied certiorari in each case."

Obviously, the reasons for denial of certiorari may have nothing to do with the merits of the case or indeed the merits of the issues presented. The Family Court for New York City, in *State Ex Rel Wilson v. Lawrence*, 73 Misc.2d 916, 343 N.Y.S.2d 249, states:

> "Perhaps the most significant facet of *Berlin (supra)* was in fact that, given the opportunity, the U.S. Supreme Court refused to intervene and denied certiorari (393 U.S. 840, 89 S.Ct. 118, 21 L.Ed.2d 111 (1968). It can thus be assumed with at least some degree of certainty that New York's approach is not disapproved by the Supreme Court."

In conclusion, it now appears to be accepted that child custody decrees are subject to modification by other states if the forum state feels that there are circumstances which justify a reconsideration and custody change. The Court is being respectfully urged to now come to grips with the specific question of the right of the forum state to change a custody decree in the absence of any allegations or showing of changed circumstances. Petitioner believes that what the Florida court did here was wrong, if not in terms of the express ruling of this Court, certainly in terms of violating at

least the spirit of the full faith and credit clause. For the Florida court to ignore a thirty-three day old Maryland custody decree and then for the beneficiary of that act to insist that a Maryland court is bound by the very principal of the full faith and credit clause which the Florida court ignored is to invite Constitutional chaos.

POINT II

UNDER EITHER DECISION WHICH THIS HONORABLE COURT COULD MAKE ON THE ISSUE OF WHETHER OR NOT FULL FAITH AND CREDIT IS TO BE EXTENDED TO CHILD CUSTODY DECREES, IN THE ABSENCE OF CHANGED CIRCUMSTANCES, THE MARYLAND COURT WAS NOT MANDATED TO HONOR THE FLORIDA CUSTODY DECREE WHEN THE FLORIDA COURT HAD CHOSEN NOT TO HONOR THE PRIOR VALID MARYLAND CUSTODY DECREE.

Assuming, as one alternative, that this Court would find that prior custody decrees, in the absence of changed circumstances, are entitled to full faith and credit, then the Florida court was mandated to honor the Maryland decree. There had been a lapse of only twenty-nine days from the final Maryland decree until the hearing in the Florida court, and no changed circumstances were either alleged or proved. Accordingly, if the Court should so rule, the Florida court would have been bound to extend full faith and credit to the Maryland custody decree, assuming the Maryland court had valid jurisdiction. No challege was ever made to that jurisdiction until the very time of the hearing for final

custody in Maryland on July 26, 1973, at which time the Respondent moved to dismiss the custody action and to dismiss his attorney. By that time, however, the Maryland court had had continuing jurisdiction for over two years and Mr. Schwartz's pendente lite custody, which allowed him to have the minor child in Florida at the time he filed for custody there on July 23, 1973, was as a result of the Maryland decree of temporary custody. Accordingly, should this court find that custody decrees are entitled to full faith and credit, absent changed circumstances, the Florida court would have been obligated to accept the Maryland custody decree and grant the Petitioner's Writ of Habeas Corpus. Conversely, if this Court should find that such custody decrees are not entitled to full faith and credit, then the Maryland court was not obligated to extend this Constitutional recognition to the Florida decree. It is important to note that the Petitioner is not saying that Judge Miller could not have chosen to honor the Florida decree if he saw fit. She is not saying that he could not have reviewed the case and awarded custody to Mr. Schwartz as a valid exercise of his judicial discretion. All she is saying is that under either alternative the Florida decree of custody was not entitled to full faith and credit because, under the first alternative there would have been no Florida decree, and under the second alternative it would not be entitled to full faith and credit. It is obvious that full faith and credit applies uniformly and equally to all the states if it is to have any meaning. Therefore, Florida had an absolute constitutional obligation to honor the Maryland decree, and what the Petitioner is saying is that Maryland's obligation can be no greater than Florida's obligation. She is not saying that she is constitutionally entitled to custody of her child, but only that the Maryland court had as much right to make an

independent examination on the merits as the Florida court did. The Maryland court had every right, if it saw fit, to honor the Florida decree. The essence of this argument is, however, that the Maryland court was not mandated by the Constitution to follow a Florida decree. While it may not be tactful to say that Maryland had the same right to ignore the Florida decree as Florida did to the Maryland decree, the Petitioner feels that a state is not obligated to give more dignity to a decree of another state than the other state gives to its decree.

Essentially, the Petitioner believes that the constitutional intention of the Full Faith and Credit clause was that each state would treat the judicial decisions of the other states as it would wish its own decisions to be treated; in short, the legal and Constitutional equivalent of the biblical injunction: "Do unto others as you would have them do unto you."

Obviously, no decision of any other court in the United States is binding upon this Court, but the case of *Moniz v. Moniz*, 142 Cal.App.2d 527, 298 P.2d 710, California (1956), as discussed in 35 ALR 3rd 520, 582, Section 8C, in indicative as to how the various states may feel about enforcing custody dcrees from other states which have ignored their decrees, by stating (at page 712 of 298 P.2d):

> "that at the time the appellant sought relief from the New Mexico courts she was acting in open defiance of the California court. It was her contumacious conduct which kept the children in New Mexico and without their presence in that state the decree on which she relies would not have been made . . . Not only is there incongruity in the position of the appellant personally in relying on a foreign decree

which was made possible by her own flouting of the orders of the court of this state, but also there would have been a failure of the Superior Court of this state to show respect for its dignity or to have yielded to a foreign decree so obtained."

And at page 713:

"... Ordinarily, after a custody order has been made in another state courts of this state will not change it unless there has been a change in circumstances, upon grounds of orderly administration of justice which will prevent vexations and interminable litigation and of recognition of the doctrine of comity. (Citations Omitted). The change of circumstance rule, however, is not hard and fast, and will yield to other considerations... In the case before us, orderly administration of justice does not demand application of the rule but rather would have caused the New Mexico court to abstain from changing the order of the California court. Nor does comity call for bringing the changed circumstance rule into play, comity being based on mutual respect, it has no firm basis unless the state has regard for its own decree not less than it has for those of other states. It is argued that the respondent, having invoked the jurisdiction of the New Mexico court (which he could not avoid doing in the circumstances) has submitted to its jurisdiction. Assuming, however, that the New Mexico court had jurisdiction, we believe did not act with due regard to the decision of the California court, and that, therefore, recognition of its decree is not upheld by the deference which commonly is granted to decisions of courts of other states..."

It is ironic that the Maryland Court of Special Appeals had decided almost the very converse of this situation in its own earlier opinion in *In Re Karol*, 11 Md. App. 400, 274

A.2d. 407 (1971). The court there discussed the Maryland law of jurisdiction which is to the effect that in the case of separation or divorce the domicile of the child is that of the parent having lawful custody. Under Maryland law, therefore, since Mrs. Schwartz's domicile in Maryland was never challenged in the proceedings below, as was noted in Footnote 1 to the Court's opinion, the domicile of the minor child became that of Mrs. Schwartz, i.e., Maryland, on August 30, 1973. In *Karol* (11 Md. App. at page 410) the court states:

> "Until it was lawfully modified, Mrs. Karol was entitled to custody of the child. Therefore Mr. Karol's act in taking the child from the custody of Mrs. Karol without her knowledge or consent and removing him to Maryland, which we do not find to be disputed, was unlawful. It was only because of this wrongful act by Mr. Karol that Mrs. Karol came to Maryland. She did so, we think clear, only to recover her son, the custody of whom she was legally entitled and of which she had been wrongfully deprived by Mr. Karol. *It was, we think, tantamount to her having been inveigled, enticed or induced by a wrongful device to come within the jurisdiction of the court. Only by so coming within the jurisdiction of the court was Mr. Karol enabled to have process personally served on her; only by the making of personal service of process did the court obtain personal jurisdiction of her; only by obtaining personal jurisdiction of her was there compliance with Art. 16, Sec. 66 (f); only by compliance with that statute would the court have jurisdiction over the custody of the child.* The effect is that Mr. Karol would be permitted to take advantage of his own wrong; we do not think he should be permitted to take advantage of his own wrong in such manner. Mrs. Karol was within the jurisdiction of the court by

reason of the wrongful act of Mr. Karol, and no act accomplished thereby should be allowd to stand." (Emphasis supplied).

The California court was following the same opinion as expressed in *Evans v. Keller*, 35 N. Mex. 659, 6 P.2d 200 (1931), where that court stated:

"... so in giving effect to prior adjudication the court does not depart from the doctrine contended for. It merely recognizes that the question already has been settled and dtermined."

"Any other rule would be disastrous in the extreme, would reward contempt and would place a premium on abduction. The courts of any one of forty-eight different states would, in the mind of a designing claimant to a child's custody, offer hope that there could be an adverse decision elsewhere, be circumvented, and a tortious custody of the minor made lawful. Fortunately, the jurisprudence of our country has not so moulded the law."

Essentially the decisions of the state courts seem to be consistent in holding that the principal for full faith and credit or judicial comity permits each forum state to examine how the rendering state has treated prior decrees of the forum state. As stated in *Casteel v. Casteel*, 45 N.J. Supp. 338, 132 A.2d 529, 538 (1957):

"Every state is entitled to enforce in its own courts the policy of its own statutes on subjects properly the incidents of its jurisdiction, and the full faith and credit clause of the United States constitution does not require otherwise unless the conflicting statute of another state is shown, on some rational basis, to have a superior basis for recognition. *Alaska Packers*

Association v. Industrial Accident Commission, 294 U.S. 532, 547, 548, 55 S.Ct. 518, 79 L.Ed. 1044 (1935) ... Subsequent decisions of the United States Supreme Court given application in this state, exemplify the versatility of the principal that full faith and cedit will give way to strong local policy. *Estin v. Estin*, 334 U.S. 541, 547, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948), *Carroll v. Lansa*, 349 U.S. 408, 411, 75 S.Ct. 804, 99 L.Ed. 1183 (1955) ..."

POINT III

THE FLORIDA COURT HAD NO JURISDICTION TO RENDER THE CUSTODY DECREE IT DID ON OCTOBER 2, 1973.

The opinion of the Court of Special Appeals of Maryland was grounded on the argument that Mrs. Schwartz had appeared in the Florida courts, was served with process in Florida, and had therefore consented to the jurisdiction of the Florida court. On that basis the Court of Special Appeals ruled that the Florida decree was therefore valid and was therefore entitled to full faith and credit. The authority cited for this proposition was *Scherrer v. Scherrer*, 334 U.S. 343, 351, 352, 92 L.Ed. 1429, 68 S.Ct. 1097 (1948). The vital distinction, of course, is that *Scherrer v. Scherrer* was a divorce case and not a child custody case. Therefore, the Maryland court's statement is not relevant when it said:

"Having had her 'day in court' on the jurisdictional issue, Mrs. Schwartz is barred by res judicata from now collaterally attacking the Florida judgment. Rethorst, 214 Md. at 13. The Florida decree is entitled to full faith and credit." (26 Md. App. 427, 432)

It is significant that in *Berlin v. Berlin, supra,* the New York Court of Appeals held that questions of waiver and estoppel, which were so heavily relied upon by the Maryland Court of Special Appeals, were totally irrelevant in child custody cases. The Petitioner has consistently contended that her appearance in Florida was solely to prosecute the Writ of Habeas Corpus which she had filed in order to implement her Maryland custody decree. The Florida court unilaterally consolidated her petition with Mr. Schwartz's custody petition, and her failure to object was solely because she was advised that under Florida law she had no choice.

The Maryland court emphasized very heavily that the Petitioner had waived her jurisdictional defenses by appearing in the Florida Court. Indeed, the opinion of the trial court is quoted verbatim and extensively in the opinion of the appellate court. This court, however, has defined waiver in the classic definition contained in *Johnson v. Zerbst,* 304 U.S. 458, 454, 82 L.Ed 1461, 1466, 58 S.Ct. 1019, 1023 (1938) as follows:

> "An intentional relinquishment or abandonment of a known right or privilege."

There was certainly no intentional relinquishment or abandonment by Mrs. Schwartz in the Florida court. She was simply faced with a fait accompli. For instance, at page 26 of his deposition, William H. Peeples, Esq., Mrs. Schwartz's Florida attorney, was asked by Mr. Schwartz's attorney:

> "Q. At that point did she have a legal alternative other than to submit to the jurisdiction of the Florida court? A. She didn't have any alternative. She had to submit to the jurisdiction of the court here."

Her appearance therefore should be considered in the nature of a special appearance for the limited purpose of presenting her Habeas Corpus petition. Without her appearing for the purpose there never would have been any personal service over her, and without that personal service there would have been no jurisdiction.

As this Court stated in *Vanderbilt v. Vanderbilt,* 354 U.S. 416, 418, 1 L.Ed 2d 1456, 77 S.Ct. 1360 (1957):

> "It has long been a constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."

The Court there discussed its earlier decision in *Estin v. Estin,* 334 U.S. 541, 92 L.Ed 1561, 68 S.Ct. 1213 (1948).

It is clear from *Vanderbilt* and other decisions that the line of these cases, beginning with *Williams v. North Carolina I* and extending through *Williams v. North Carolina II,* through *Scherrer v. Scherrer, supra,* and *Coe v. Coe,* 334 U.S. 378, 92 L.Ed 1451, 68 S.Ct. 1094 (1947), which are based upon discussions of ex parte divorce, have been distinguished essentially by the quartet of *Halvey v. Halvey, supra, May v. Anderson, supra, Kovacs v. Brewer, supra,* and *Ford v. Ford, supra.*

Whatever the merits of Justice Harlan's concurring opinion in *Simons v. Simons,* 381 U.S. 81, 14 L.Ed 232, 85 S.Ct. 1315, Reh. den. 381 U.S. 956, 14 L.Ed.2d 728, 85 S.Ct. 1797 (1965) that the Court has made a partial retreat from *Vanderbilt v. Vanderbilt, supra,* the distinction between the line of divorce cases and the line of custody cases still

appears to be firm. See the annotation "Divorce Decrees and Full Faith and Credit – Supreme Court Cases." 14 L.Ed.2d 917 (1965).

Under the *Karol* decision the Maryland court would never have acted as the Florida court did, and indeed would have felt compelled to honor the Florida decree.

In *Kennedy v. Carmen, supra*, at page 287 of 471 S.W.2d the Missouri court stated:

> "Courts are frequently troubled by a particular type of case – that of the losing parent who, being dissatisfied with the custody award, removes the child to another state in violation of the court's order and there seeks a redetermination of the issue. The courts of some states have flatly refused to assume jurisdiction under those conditions on the grounds that the petitioning parent, having defied the judgment of the first count, does not satisfy the criterion of 'clean hands'."

The Court goes on to note that custody decisions require personal service and jurisdiction in personam, citing *May v. Anderson, supra, Armstrong v. Armstrong*, 350 U.S. 568, 100 L.Ed 705, 76 S.Ct. 629 (1955), *Vanderbilt v. Vanderbilt, supra*, and *Estin v. Estin, supra.*

In summary, the Petitioner believes that the Florida court was without jurisdiction to hold the hearing which resulted in the Florida custody decree, but if this argument is to be rejected, it does not matter, because the full faith and credit arguments outlined in Points I and II are dispositive of the issue, one way or another. Just in in the *Karol* decision, had

Mr. Schwartz and the Florida courts honored the Maryland decree then Mrs. Schwartz would not have been obligated to go to Florida to file her Writ of Habeas Corpus. Without her appearance there, no personal jurisdiction could have been obtained over her. In effect, she was forced to go to Florida to enforce her legal rights and then that appearance was used as a basis for frustrating her rights.

CONCLUSION

This Court has seen fit to reserve judgment on the specific point raised herein. The Petitioner realizes fully that this Honorable Court will not decide a case on a Constitutional basis if there is a non-constitutional basis for doing so. However, she believes that in this case there is no alternative should the Court set fit to come to grips with the specific issue of the full faith and credit to be applied to child custody decrees in the absence of changed circumstances. The Maryland court, by not deciding this issue, really did not resolve anything. Obviously, the decision to accept Petitions for Writ of Certiorari is often based on policy decisions which are totally separate from the merits of any given case, but the Petitioner feels that the time has come for the specific issue raised herein to be resolved so that the ever growing and conflicting state opinions on this point can be at last laid to rest.

Respectfully submitted,

ROBERT ANTHONY JACQUES,

Attorney for Petitioner.

APPENDIX A

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
NO. 905
September Term, 1974

JEANNE SCHWARTZ

v.

GEORGE M. SCHWARTZ

Morton,
Gilbert,
Lowe,
JJ.

Opinion by Lowe, J.

(Filed May 29, 1975)

Conflicts among courts of the States cannot be avoided when litigants are jurisdictional nomads. The parties here were married in Florida wherein they lived together as husband and wife. Presumably, the matrimonial sea was either too calm or too turbulent for after eight years they were divorced in that State. Apparently the divorce did not erase the affection each had for the other. They continued to live together in the same home, and while their marriage was not blessed with a child, their subsequent relationship was. Two years after their divorce their child was born.

Since each of the proceedings we are about to detail dealt with custody, an *in rem* action, the jurisdiction of the hearing court depended in the first instance on the domicile of the child. *Renwick v. Renwick*, 24 Md. App. 277, 184. The Court of Appeals has held that a child's domicile is that of the parent with legal custody, *Taylor v. Taylor*, 246 Md. 616, 618-619; *accord*, *Seidlitz v. Seidlitz*, 23 Md. App. 327, 336. After issuing a decree, however, the rendering court retains jurisdiction to modify its decree, even though the domicile of the child may then be elsewhere. *Berlin v. Berlin*, 239 Md. 52. With these principles in mind, we proceed to describe the multitude of litigation to which this child has been subjected.

The Child was five years old before Mrs. Schwartz chose to leave her Florida domicile. She went to her parents' home in Bethesda, Maryland. Soon thereafter, with the help of private detectives, she obtained physical custody of the child contrary to an oral understanding with Mr. Schwartz. Mrs. Schwartz then sought and received temporary custody in the Circuit Court for Montgomery County. Assuming that Mrs. Schwartz was at that time domiciled in Maryland,[1] the court had jurisdiction to render the custody decree. *Taylor, supra.* Over a year of unpleasantness ensued including contempt hearings regarding alleged violations of visitation privileges.

Mrs. Schwartz then moved out of state. Although she denied that her attorney was not apprised of her whereabouts, no one seemed to know that she had taken up residence in

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[1] We do not consider whether Mrs. Schwartz's two year stay in Maryland met the requisites of domicile because the issue was never raised nor treated below.

California. Thus, when the Maryland court heard a petition for contempt filed by Mr. Schwartz, Mrs. Schwartz was not physically present, although her attorney and her parents were. The hearing judge transferred temporary custody to Mr. Schwartz. Even though at this point Mrs. Schwartz and the child were living in California, the Maryland court, having rendered the initial custody decree, had jurisdiction to modify the decree to give Mrs. Schwartz temporary custody under the continuing jurisdiction doctrine. *Berlin, supra*, 239 Md. 52. Mr. Schwartz, himself, engaged private detectives to find mother and child and through their efforts, physically took custody of the child and returned with her to his Florida home where he promptly petitioned the Florida court for permanent custody and other relief.

Having commenced those proceedings in Florida where he lived, which was thereby the legal residence of his child, *Taylor, supra*, 246 Md. 616, Mr. Schwartz did not personally reappear in Maryland when Mrs. Schwartz apparently returned here and petitioned the Montgomery County court for restoration of custody. Mr. Schwartz's motion to dismiss that proceeding filed by his counsel was denied and the Maryland chancellor awarded temporary custody back to Mrs. Schwartz. Again, the Maryland court had jurisdiction to modify its decree under the continuing jurisdiction doctrine. *Berlin, supra*, 239 Md. 52.

When Mrs. Schwartz and her own private detectives were physically unable to remove the child from Florida, Mrs. Schwartz filed a Writ of Habeas Corpus there, based on her Maryland decree. The Florida court consolidated Mrs. Schwartz's writ petition with Mr. Schwartz's custody petition

without objection and proceeded with a full custodial hearing which resulted in custody of the child being awarded to her father on October 2, 1973. No appeal was entered. [2] Mrs. Schwartz's Maryland proceeding and Mr. Schwartz's Florida proceeding were practically simultaneous, although the Florida decree was last issued. Both courts had jurisdiction to hear the custody proceeding; Maryland under the continuing jurisdiction doctrine, *Berlin, supra,* 239 Md. 52, Florida because the child was domiciled there, *Renwick, supra,* 24 Md. App. 277.

Under the liberal visitation provisions of that Florida decree the child visited her mother in California for a week at the end of 1973 and arranged for a six week visit the following summer in accordance with the decree. On this occasion, however, the child was not returned to her father. Unbeknown to him, Mrs. Schwartz had taken her back to her parents' home in Bethesda.

Mr. Schwartz filed a petition for Writ of Habeas Corpus which Writ was signed by Judge Ralph G. Shure who upon the voluntary appearance of mother and child and assurance of subsequent appearance under oath, assigned the issue for hearing before Judge H. Ralph Miller. Following that evidentiary hearing, Judge Miller signed an order affirming Judge Shure's Writ and directing the delivery of the child to Mr. Schwartz, thereby extending "full faith and credit" to the Florida decree. Mrs. Schwartz appeals that ruling by asserting lack of jurisdiction in the Florida court. She claims now that neither she nor the minor child were domiciled in Florida and

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[2] The entire Florida proceedings were admitted into evidence below.

further that she appeared for the limited purpose of implementing the Maryland decree.

The record reflects that at the time the Florida jurisdiction was invoked the child was in the custody of her father whose residence is and was throughout, Florida. Furthermore, by petitioning the Maryland courts to *restore* custody to her, Mrs. Schwartz impliedly admitted that her husband had lawful custody. As we have previously noted, the domicile of the child – determinative of custody jurisdiction, *Renwick, supra,* 24 Md. App. 277 – follows that of the parent with legal custody, *Taylor,* 246 Md. at 618-619. The Florida court therefore had jurisdiction, albeit concurrent with Maryland's continuing jurisdiction. Since a custody decree is "conclusive of the status of the child *at the time* the decree was rendered" *Rethorst v. Rethorst,* 214 Md. 1, 13, [emphasis added] custody provisions may change as circumstances change, and the latest decree, *viz.*, Florida, must control.

We have treated the merits of the jurisdiction question even though we need not have. The chancellor below found as a fact that Mrs. Schwartz had appeared generally in the Florida proceeding. The test by which that finding of fact must be reviewed is set forth in Md. Rule 1086, the clearly erroneous rule, *Renwick,* 24 Md. App. at 282-283, and we do not find that finding of fact to be clearly erroneous.

By participating in the Florida custody hearing, Mrs. Schwartz had a full opportunity to contest the jurisdiction of the Florida court. If she raised that issue and disagreed with the chancellor's decision, her remedy was to appeal, a remedy

which she did not pursue. It matters not whether she actually litigated the jurisdictional issue there, only that she had the opportunity to do so. Considering the same issue in the analogous situation of a divorce proceeding, the Supreme Court held:

> "[T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by a defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues . . . ."
>
> . . . If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister state on a decree valid in the State in which it was rendered." *Sherrer v. Sherrer*, 334 U.S. 343, 351-352; *accord, Day v. Day*, 237 Md. 229, 234.

Having had her "day in court" on the jurisdictional issue, Mrs. Schwartz is barred by res judicata from now collaterally attacking the Florida judgment. *Rethorst*, 214 Md. at 13. The Florida decree is entitled to full faith and credit.

We found the opinion of the chancellor below cogently expressed our reactions to this case. After setting forth the factual background, he explained:

> "There is a writ of *habeas corpus* in which the petitioner, the defendant, asked to have full faith and credit extended to the final decree of Florida State, based on concurrent jurisdiction and that being the

latest decree; and the Court will have to decide the question whether that decree is entitled to have full faith and credit, because there is some allegation that the plaintiff wife went to Florida only to enforce her Maryland decree.

The Court will take into consideration, also, that the Florida decree is the only decree of this Court, excepting the first *pendente lite* order to the wife, where the parties were ever really both before the court to litigate their problems.

The Court is not at all happy about what has occurred in this case, particularly with regard to the plaintiff, Mrs. Schwartz. I am not happy, either, with Mr. Schwartz, who did not appear for the custody hearing here. But the home investigation was done on the basis of the California home, and the next thing I know, there is litigation going on in another State and then the wife is back here with her parents.

This child cannot be dragged all over the United States, and I think that the parties did just what was right; and I am not at all convinced by the wife's testimony that at the time she did not believe that, also. They got together and they litigated the matter, and obviously she is unhappy with the result. There is not any doubt in my mind that she initially went down to Florida simply to enforce her Maryland decree; but the exhibits seem patently clear to me, that once down there they resolved their differences and decided to let that court decide the issue of custody.

I am keeping in mind that this was the first time that had really occurred. It is a later decree, and the Court holds that the Florida court clearly had jurisdiction, concurrent jurisdiction with this State and that it was not just a simple matter of enforcing the Maryland decree.

* * * * * * * *

The fact that [Mrs. Schwartz] did not agree with the Florida attorney is no matter of defense. The Florida decree was passed when both parties were before the court and when, quite obviously from the exhibits, a statement was made by the judge in his decree – and it was based on the testimony and participation of the parties – that they wanted to lay to rest forever their troubles. That is just exactly what they did.

It being a later decree, the Court extends full faith and credit to the decree of the State of Florida. The writ of *habeas corpus* issued on August the 22nd, 1974, is hereby affirmed."

We affirm the action of the chancellor.

JUDGMENT AFFIRMED
COSTS TO BE PAID BY APPELLANT.

APPENDIX B

**IN THE
COURT OF APPEALS
OF
MARYLAND**

**Miscellaneous Docket No. 213
September Term, 1975**

**(No. 905, September Term, 1974
Court of Special Appeals)**

JEANNE SCHWARTZ
v.
GEORGE M. SCHWARTZ

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/Robert C. Murphy
Chief Judge

Date: September 8, 1975.